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No. 97-5310

In The

Supreme Court of the United States

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

OCWEN FEDERAL BANK,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

May an action for the statutory right of rescission provided by the Federal Truth in Lending Act, 15 U.S.C. Section 1635, be revived as a defense in recoupment beyond the 3-year limit on the right of rescission set forth in Section 1635(f)?

PARTIES TO THE PROCEEDINGS

David R. Beach, Defendant-Petitioner

Linda M. Beach, Defendant-Petitioner

Great Western Bank, f/k/a

Great Western Savings, Plaintiff/Respondent

Ocwen Federal Bank, Respondent

Ocwen Financial, Inc., parent company of Ocwen Federal Bank

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The opinion of the Supreme Court of Florida (J.A. 157) is reported at 692 So. 2d 146 (Fla. 1997). The opinion of the Florida Fourth District Court of Appeal (J.A. 129) is reported at 670 So. 2d 986 (Fla. 4th Dist. Ct. App. 1996). The decision of the Circuit Court of Palm Beach County, Florida (J.A. 35-60) is unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review a final judgment of the Supreme Court of Florida, pursuant to 28 U.S.C. § 1257. The Supreme Court of Florida issued its decision February 13, 1997, and denied Petitioners' timely motion for rehearing on April 25, 1997. The petition for writ of certiorari in this Court was filed on July 23, 1997, and certiorari was granted on October 14, 1997.

STATUTES INVOLVED

The following statutes and regulations are set forth in the Appendix to this Brief:

15 U.S.C. § 1635

15 U.S.C. § 1640

12 C.F.R. § 226.23(a,f,g,h)

STATEMENT OF THE CASE

A lender sought to foreclose on a mortgage loan in which it had made material errors in Truth in Lending disclosures. The mortgage had been consummated five years earlier. The consumers raised the lender's Truth in Lending Act violations as a defense to the foreclosure suit and requested both rescission and set-off damages as remedies in recoupment. Section 1635 of the Truth in Lending Act (15 U.S.C. § 1635) gives consumers the right to rescind a mortgage by delivering a notice to the lender within three days of the consummation of the loan, and extends the right to rescind up to three years if the creditor fails to deliver the disclosures and notices required by the statute. Most courts which have addressed the three-year provision have held that the time period does not apply when rescission is presented as a defense in an action brought by a lender. *See* n. 5, *infra*, at 14. However, the Supreme Court of Florida concluded that the Act permits defenses seeking recoupment of damages but bars defensive rescission beyond the three years. That court concluded that Congress intended Section 1635 both to limit a consumer's affirmative right to rescind a mortgage to three years and to bar consumers from seeking rescission in recoupment when a lender who has violated the Act attempts to foreclose on a loan after more than three years.

A. Rescission Under the Truth-in-Lending Act.

Congress enacted the Truth-in-Lending Act in 1968 to remedy divergent and often fraudulent consumer lending practices. *See Mourning v. Family Publications Services Inc.*,

411 U.S. 356, 363-367 (1973). The statute requires lenders to clearly and conspicuously disclose the critical terms of a credit agreement, facilitates competition among lenders and comparison shopping by consumers, and protects consumers against unfair credit practices. 15 U.S.C. § 1601(a).

Among other provisions, the Act requires that lenders clearly and conspicuously disclose the finance charge, annual percentage rate, and other terms specified by Congress and the Federal Reserve Board. §§ 1631, 1632, 1638. If the loan is secured by the consumer's home, the lender must also clearly and conspicuously disclose that the consumer has the right to rescind the transaction. § 1635. On such loans, the consumer has an absolute right to reconsider and rescind the agreement for three business days following the day of the transaction or the day of delivery of the forms setting forth the consumer's right to rescind and the material disclosures required by the Act, whichever is later. § 1635(a). Rescission is accomplished by simply delivering a notice to the lender. Rescission returns the parties to their status before the closing. The mortgage is canceled, the security interest "becomes void," and the lender is required to return any down payment or earnest money. § 1635(b). The consumer, in turn, is excused from liability for finance charges or other charges, 12 C.F.R. § 226.23(d)(1-4), and is required to return the principal.

As originally enacted, the three-day limitation period was extended until the proper disclosures and notices were delivered, if the lender failed to make the required disclosures or failed to adequately notify the consumer of the right to rescind. In 1974, in response to reports that

allowing this right to extend indefinitely until required disclosures have been made clouded the title to residential properties, Congress added § 1635(f), which provides that the consumer's "right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this part have not been delivered." Pub. L. 93-495, 88 Stat. 1517, § 405(f) (now codified, as amended, as 15 U.S.C. § 1635(f)).[1]

A separate section of the Act, Section 1640, authorizes consumers to bring private civil actions for actual damages, statutory damages, and enforcement of the rescission provision. 15 U.S.C. § 1640(a). Actions for such relief must be brought within one year from the date of the violation. However, violations of the Act may also be raised defensively by way of recoupment or set-off when a consumer is sued by a lender. Prior to 1980, there was a split in authority over whether the one year limitation on civil actions also barred raising violations of the Act as a recoupment defense in collection proceedings.[2] In 1980,

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[1] Additional amendments to § 1635(f) in 1980 allowed consumers to rescind more than three years after the transaction if a government agency had initiated a successful enforcement proceeding before the three-year period expired. Pub. L. 96-221, 94 Stat. 176, § 621(a)(6).

[2] *Compare Household Consumer Discount Co. v. Vespanziani*, 490 Pa. 209, 415 A.2d 689 (1980) (limitation period does not bar recoupment); *Household Finance Corp. v. Pugh*, 288 N.W.2d 701 (Minn. 1980) (same); with *Devlin v. Aetna Finance Co.*, 379 So. 2d 972 (Fla. 5th Dist. Ct. App. 1979), *cert. denied*, 389 So. 2d 1108 (Fla. 1980).

Congress resolved the dispute in favor of consumers by amending Section § 1640 to provide explicitly that the one-year limitation period does not preclude raising violations of the Truth in Lending Act more than one year from the date of the violation "as a matter of defense by recoupment or set off" in an action brought to collect a debt. 15 U.S.C. § 1640(e).

In 1995, Congress amended the Truth in Lending provisions on rescission in response to the Eleventh Circuit's decision in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994), *abrogated on other grounds, Veale v. Citibank, F.S.B.*, 85 F.3d 577 (11th Cir. 1996). Mortgage lenders sought relief from *Rodash* because its holding was characterized as meaning that consumers could rescind mortgages based solely on minor, technical violations of the Act. *See, e.g.*, 141 Cong. Rec. 4120 (daily ed. Sept. 27, 1995) (statement of Rep. Roukema). In response, Congress imposed a six-month moratorium on certain types of class actions and used that time to negotiate a "compromise to a highly technical problem." 141 Cong. Rec. S14566-67 (Sept. 28, 1995) (comments of Sen. D'Amato); *see also* 141 Cong. Rec. H9515 (Sept. 27, 1995) (comments of Rep. Gonzalez) ("I want to emphasize that this bill is a compromise."). The resulting Amendments protect lenders by expanding the tolerance for inaccurate statements of finance charges and providing immunity for errors on pre-Amendment loans which otherwise would give rise to liability under the Act. *See* Pub. L. 104-29, 109 Stat. 271 (1995). However, the Amendments limit the use of this new immunity if the lender forecloses, by giving consumers faced with foreclosure the right to rescind in circumstances where the new tolerances or immunity

would otherwise foreclose liability. Thus, the 1995 Amendments created two different standards for rescission depending on whether it arises affirmatively or as a defense. When the consumer acts affirmatively to rescind, the standards in Section 1635(f) and 1649 govern. However, when rescission in recoupment is raised a defense in foreclosure proceedings, the standards in Section 1635(i) apply and permit rescission in circumstances where it otherwise would not be allowed.

For example, the Amendments provide that misstatements in the finance charge for mortgage disclosures shall be treated as accurate if the errors are within certain tolerances. 15 U.S.C. § 1605(f). But if a foreclosure proceeding has been commenced, the consumer has the right to rescind, even if the error is within the 1995 Amendment tolerances, if the finance charge is misstated by more than $35. § 1635(i)(2). In addition, the 1995 Amendments generally immunize lenders from liability on pre-Amendment loans if the lender failed to include certain charges or fees in the finance charge or failed to use the appropriate form to notify the consumer of the right of rescission. § 1649(a)(1), (a)(2). However, in a foreclosure proceeding a consumer may exercise rescission rights based on most of these errors. § 1635(i)(1).

After setting forth these special rights to rescission in foreclosure under the statute, the 1995 Amendments also state that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." § 1635(i)(3). The statute also contains a more general provision on preservation of state law, which dates from 1980, and provides that, "[e]xcept as specified in sections 1635, 1640, and 1660 of this title, this subchapter

and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law." 15 U.S.C. § 1610(d).

B. Petitioners' Mortgage and the Proceedings Below

In 1986 Petitioners David and Linda Beach built a home with a mortgage and construction loan financed by First Fidelity Savings and Loan. After construction was completed and they occupied the home, Petitioners refinanced through a loan from Great Western Bank. Great Western later changed its name to Ocwen Federal Bank. Great Western provided the Beaches with Truth in Lending Act disclosure statements and notice of the right to rescind, but the disclosure statements misstated the finance charge, the amount financed and the annual percentage rate of the loan, in violation of 15 U.S.C. § 1638(a)(3), (4) & (5).[3]

Petitioners made their monthly installment payments on the loan until December 1991, when they defaulted. Great Western instituted foreclosure proceedings in June 1992, and Petitioners raised Great Western's violation of the Truth in Lending Act as an affirmative defense to the foreclosure action, arguing that the violations entitled

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[3] Respondent (Great Western) overstated Petitioners' monthly mortgage payment by fifty-eight cents ($0.58), resulting in a $201.84 overcharge. Respondent also overstated the finance charge by $7.24. J.A. 159. Those errors satisfy the definition of material disclosure errors. *See* 15 U.S.C. § 1602(u); 12 C.F.R. § 226.23, n. 48, *infra* App. 15a.

them to rescind and to reduce Great Western's claim by the amount of their damages under the Act.

The trial court agreed that Petitioners were entitled to raise the Truth in Lending violations defensively, found that Great Western had violated the Act, and ruled that Petitioners were entitled to offset their damages from this violation against the balance due Great Western. However, the trial court concluded that rescission in recoupment was not available to Petitioners for these violations because of the three-year limitation period in 15 U.S.C. § 1635(f). J.A. 54-81. In a divided opinion, Florida's Fourth District Court of Appeal affirmed the trial court's ruling that Section 1635(f) bars rescission in recoupment after three years, and certified the question to the Supreme Court of Florida.[4] J.A. 129-153.

The Supreme Court of Florida acknowledged that federal and state courts, including Florida courts, had repeatedly recognized that " '[i]t is well established that the defense of recoupment may be asserted defensively where the underlying claim is barred by the statute of limitations.' " J.A. at 165 (quoting *Willoughby v. Dowda & Fields, Chartered*, 643 So. 2d 1098, 1099 (Fla. 5th Dist. Ct. App. 1994). But the Supreme Court of Florida concluded that Section 1635(f) forecloses such a recoupment defense

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[4] The trial court had concluded, in the alterative, that the transaction was not subject to rescission because it fell within one of the statutory exemptions. J.A. 73-74. On review, the Florida District Court of Appeal disagreed, stating "this is not an exempt transaction." J.A. 133. The Supreme Court of Florida did not disturb that conclusion.

because "we read that section as unambiguously expressing Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing." J.A. 171. The court based this conclusion on Congress' failure to include a clause in Section 1635 stating that rescission could be raised in recoupment beyond the three-year period. *Id.* The court reasoned that, because Congress had included a savings clause expressly preserving damages in recoupment beyond the limitations period in Section 1640(e), the court should presume that the omission of such a clause in Section 1635(f) implies that subsection (f) rescission limitations do apply to recoupment. Based on this construction of the statute, the court concluded that a defense based on rescission beyond the three-year period in Section 1635(f) was precluded.

The 1995 Amendments to the Truth in Lending Act, including the provision stating that nothing in the statute "affects a consumer's right of rescission in recoupment under State law," were enacted while this case was pending before the Florida District Court of Appeal. Those Amendments "apply to all consumer credit transactions in existence or consummated on or after the date of the enactment" of the Amendments, September 30, 1995. 15 U.S.C. § 1635(i)(4). However, both the District Court of Appeal and the Supreme Court of Florida concluded that the Amendments had no bearing on their rulings and relegated the Amendments to footnotes. *See* J.A. 130 (n.1), J.A. 164 (n. 6).

Certiorari was sought because the decision of the Supreme Court of Florida conflicted with decisions of other courts which have held that rescission in recoupment could be asserted by a consumer as an affirmative

defense more than three years after the transaction occurred.

SUMMARY OF ARGUMENT

This Court has emphasized that statutory limitation periods generally do not apply to defenses such as recoupment and that courts should not construe statutes to bar such defenses absent " 'the clearest congressional language' " showing that Congress intended to depart from the general rule. *Reiter v. Cooper*, 507 U.S. 258, 265 (1993) (*quoting United States v. Western Pac. R. Co.*, 352 U.S. 59, 71 (1956)). This presumption that defenses are generally not foreclosed arises from the fact that where a suit has already been brought, courts should be permitted to examine, and render a decision on, the entire transaction. Courts should not be precluded from considering evidence that the plaintiff violated the law in the transaction for which the plaintiff seeks a recovery.

The decision below wholly ignores this rule of construction. The Truth in Lending Act does not contain any language which could be construed as a clear statement that Congress intended to restrict the ability of consumers to assert rescission defensively based on violations of the Act. To the contrary, the language of the statute seeks to protect consumers' ability to raise this defense, not restrict it. *See* 15 U.S.C. §§ 1635(i), 1640(e). The 1995 Amendments confirm that Congress did not intend to place restrictions on the defense of recoupment in foreclosure. The three-year limitation in Section 1635(f) applies to the consumers' right to rescind a loan by

delivering a written notice; it does not address or purport to limit the availability of rescission as a defense when a lender brings foreclosure proceedings on a loan made without the accurate disclosures required by the Truth in Lending Act. Indeed, the Supreme Court of Florida's analysis shows that it could not find any clear expression of congressional intent to limit recoupment; it resorted instead to a negative inference to imply a restriction which Congress did not impose. *But see Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 (1980) ("[C]aution must temper judicial creativity in the face of legislative or regulatory silence").

By erroneously viewing Section 1635(f) as a three-year bar to rescission in recoupment, the Supreme Court of Florida denied Petitioners the ability to raise the recoupment defense recognized under both Florida and federal law. Florida law recognizes that rescission can be raised defensively through recoupment, even if a statutory limitation would bar an affirmative action for rescission, and there is no basis in Florida law for denying that defense for violations of the Truth in Lending Act. Moreover, federal law generally recognizes that defendants may raise otherwise barred federal claims as recoupment defenses in order to protect federal rights and prevent plaintiffs from enforcing contracts which violate federal law. The Section 1635 statutory right of rescission should be available to a consumer as a defense in recoupment in a foreclosure action, even if raised more than three years after the consummation of the loan. That result would be consistent with the universally applied liberal construction of the Truth in Lending Act in favor of consumers.

ARGUMENT

I. SECTION 1635(f)'S THREE-YEAR LIMIT ON THE RIGHT OF RESCISSION DOES NOT BAR THE DEFENSE OF RECOUPMENT BASED ON RESCISSION

It has long been recognized that statutory limitation periods generally do not apply to defenses, including recoupment, and thus, such defenses may be raised at any time in response to a claim arising out of the same transaction. *Bull v. United States*, 295 U.S. 247, 262 (1935). Statutory limits should not be construed to bar such defenses absent " 'the clearest congressional language' " showing that Congress intended to bar defenses as well as affirmative suits. *Reiter v. Cooper*, 507 U.S. 234, 265 (1993) (*quoting United States v. Western Pac. R. Co.*, 352 U.S. 59, 71 (1956)). No such language exists in the Truth in Lending Act. To the contrary, as we show below, the statute specifically preserves a consumer's right of rescission in recoupment.

A. Both State and Federal Law Recognize that Defenses, Including Rescission in Recoupment, are Not Subject to Statutory Limitation Periods.

"Recoupment" is a widely recognized common law defense. It allows a defendant to raise a claim defensively solely for the purpose of reducing or satisfying the plaintiff's claim. *See Distribution Serv., Ltd. v. Eddie Parker Interest, Inc.*, 897 F.2d 811, 812 (5th Cir. 1990); *Matter of Coxson*, 43 F.3d 189, 193 (5th Cir. 1995). Moreover, the defendant's recoupment claim must arise out of the same transaction

as the plaintiff's suit; the defendant cannot use recoupment to expand the suit to address other transactions between the parties. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946) (taxpayer not permitted to claim recoupment based on tax liability in other years as a defense to the government's tax deficiency suit for a specific year). The recoupment defense has long been recognized in federal law and state law as a common law doctrine, available without any statutory authorization. *See Dushane v. Benedict*, 120 U.S. 630, 644 (1887).

"[B]ecause recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded," recoupment "is never barred by the statute of limitations so long as the main action itself is timely." *Bull v. United States*, 295 U.S. 247, 262 (1935). Thus, in *Bull* this Court held that even though the statute of limitations barred a taxpayer from bringing a suit against the government to recover on an overpayment of taxes, common law recoupment permitted the claim to be raised by the taxpayer in defending an action brought by the government. *Id.* Indeed, this Court recently reaffirmed this principle in *Reiter v. Cooper* and emphasized that it is a "general principle" that applies unless there is express language that bars recoupment. 507 U.S. 263, 264.

Recoupment is not subject to such limitation periods for two reasons, both of which support recognition of rescission in recoupment for Truth in Lending violations. First, it would be unfair to allow a court to consider and enforce the plaintiff's claim without considering the plaintiff's own wrongdoing in the same transaction. Recoupment permits "a transaction which is made the

subject of suit by plaintiff to be examined in all its respects, and judgment to be rendered that does justice in view of the one transaction as a whole." *Rothensies*, 329 U.S. at 299. Thus, for example, when a carrier brings a claim for shipping charges, the statute of limitations cannot be used to bar the defendant from showing that the charges were excessive. *United States v. Western Pac. R. Co.*, 352 U.S. at 59. Similarly, a fraud claim which is otherwise barred can be raised defensively if a suit is brought to enforce the contract that was tainted by fraud. *See In re Holford*, 896 F.2d 176, 178 (5th Cir. 1990).

Second, as this Court observed in *Western Pacific*, the "basic policy behind statutes of limitations has no relevance" to recoupment claims. 352 U.S. at 72. Statutes of limitations are "designed to keep stale litigation out of the courts," but recoupment can only be raised if there is already a suit involving the same parties and the same transaction. "We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of applicable law." *Western Pacific*, 352 U.S. at 72.[5]

Both of these considerations apply here and, under general common law principles, a recoupment defense based on rescission should be available for the Truth in

[5] For other cases permitting time-barred claims to be raised as a defense in recoupment, *see, e.g., Luckenbach S.S. Co. v. United States*, 312 F.2d 545 (2nd Cir. 1963); *118 East 60th Owners, Inc. v. Bonner Properties, Inc.*, 677 F.2d 200 (2d Cir. 1982); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995); *Crossett Lumber Co. v. United States*, 87 F.2d 930 (8th Cir 1937).

Lending claims at issue here at any time, regardless of the statute of limitations. In order to fairly adjudicate the transaction as a whole, a court must be able to consider a consumer's claim that the loan which the lender seeks to enforce is subject to rescission because the lender failed to accurately make the disclosures required by law.

Moreover, barring the rescission defense after three years does not keep stale issues out of court. Indeed, the issues surrounding the original transaction must be addressed in deciding the recoupment claims for damages based on the same violations of the Act – damage claims that all parties agree are not barred because 15 U.S.C. § 1640(e) expressly provides that the one-year statute of limitations does not bar a "defense by recoupment or set-off." For example, in this case, the trial court adjudicated all of the allegations that Great Western violated the Act in order to decide the damages recoupment claim in Petitioners' favor, even though the court ruled that rescission in recoupment was barred.[6] Accordingly, the rule that a recoupment defense is generally not barred by the passage of time if the main action is timely, *see, e.g., Reiter*, 507 U.S. at 264; *Bull*, 295 U.S. at 262, should apply to Truth in Lending Act violations in this case, since Congress has not stated a clear directive to the contrary.

The Supreme Court of Florida also suggested that Section 1635(f) bars defensive rescission in recoupment

[6] Therefore, Petitioners contend that based on the rulings awarding damages in recoupment, they would also be entitled to rescission as a matter of law but for the erroneous ruling below that the rescission remedy was time barred.

because " 'the right and the remedy are created by the same statute. . . . ' " J.A. at 171-172 (quoting *Bowery v. Babbit*, 99 Fla. 1151, 1163-1164, 128 So. 801, 806 (1930). This analysis, however, confuses the role of federal law and Florida law, and is flawed for two reasons.

First, as this Court has emphasized, the question of whether a limitation period applies does not depend on whether the limitation provision appears in the same statute that creates the right. The critical issue is not the form of the statute, but congressional intent. Thus, in *Burnett v. New York Central R. Co.*, 380 U.S. 424, 426-27 (1965), this Court rejected the argument that the limitation period in the Federal Employees Liability Act is not subject to tolling because it is not "procedural" but is a "substantive" limitation contained in the same Act which creates the right being limited. "The basic question to be answered," this Court observed, "is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.' " *Id.* at 426 (quoting *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 360 (1943)). Congressional intent, as reflected in the "purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of rights given by the Act," showed that tolling was permitted. *Id.* at 427-28. For the same reason, in this case, the applicability of Section 1635(f) turns on congressional intent, and congressional intent is a federal question that must be determined as a matter of federal law.

Second, the court below relied on a line of cases that involved barring affirmative claims, not defensive recoupment. The Florida and federal decisions cited by

the court below conclude that the time for bringing an affirmative claim that would otherwise be barred should not be tolled where the statute creating the right sets the limitation period. J.A. 172 (citing *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957) (time for filing suit is not tolled by disability); *Maahs v. United States*, 840 F.2d 863, 866 n. 4 (11th Cir. 1988) (rules for extensions and tolling of time to file suit that apply to normal statutes of limitations do not apply to 28 U.S.C. § 2401(b)). However, this Court's decision in *Western Pacific* makes clear that the defense of recoupment is not subject to the same limitation. *Western Pacific*, 352 U.S. at 72-73; *see also Distribution Serv., Ltd. v. Eddie Parker Interests, Inc.*, 897 F.2d 822, 813-14 (5th Cir. 1990) (decisions involving application of limitation period to affirmative claim do not apply to defensive claims of recoupment). To construe Congress' intent in Section 1635(f), the Court must look to federal law, and *Western Pacific* makes clear that the line of decisions that the court below relied upon are not applicable here because federal law provides that defenses are not foreclosed by statutory limitations unless Congress has clearly expressed its intention that defenses should be barred.

B. The Truth in Lending Act Does Not Contain the Clear Statement Necessary to Impose a Three-Year Limitation on the Defensive Use of Rescission in Recoupment.

Western Pacific and *Reiter, supra*, make clear that statutes may be construed to bar recoupment only if Congress has stated its intention to do so in clear,

unambiguous terms. In *Western Pacific* this Court emphasized that "[o]nly the clearest congressional language could force us to a result" that would allow the two-year limitation period in the Interstate Commerce Act to bar reference of a recoupment claim based on that Act. 352 U.S. at 71. Because the limitation period in the statute did not specifically address recoupment or referral, it could not be interpreted to bar such a claim:

> On its face [the statute of limitations] has to do only with the commencement of actions or reparation proceedings before the Commission. There is therefore no language which militates against the conclusion that the statute does not apply to referrals.

Id. at 72. Indeed, this Court emphasized that the result would be the same even if the limitation period was jurisdictional. The critical question is "whether Congress intended it to apply to referrals as well as affirmative suits," and in the absence of clear language to the contrary a limitations statute should not be extended to bar "defenses in actions properly and timely brought." *Id.* at 73.

In *Reiter*, the Court reaffirmed this rule and emphasized that it is based on general principles. The Court held that recoupment is available as long as the main action is timely and repeated *Western Pacific*'s admonition that recoupment should be barred only by " 'the clearest congressional language.' " 507 U.S. at 264. (quoting *Western Pacific*, 352 U.S. at 71.)

Nothing in the Truth in Lending Act provides a clear statement of any congressional intent to make rescission

in recoupment subject to the three-year limitation in Section 1635(f). To the contrary, review of the entire Act and its history shows that where Congress has explicitly addressed recoupment, it has sought to preserve or extend consumers' ability to raise Truth in Lending violations as a defense, rather than to limit such defenses.

1. **The Pre-1995 Statutory Language.** The language of the Act, even prior to the 1995 Amendments, does not provide any clear statement of congressional intent to bar recoupment after three years. Prior to the 1995 Amendments, Section 1635 contained no mention of recoupment and no language stating or even suggesting that this Section was intended to limit recoupment. Indeed, the only language in the statute concerning recoupment prior to the 1995 Amendments appears in Section 1640(e) and states that the one-year limitation on bringing a civil action does not bar a defendant from raising a violation of the Act "as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law," even if the main suit is brought long after the limitation period has elapsed. § 1640(e).

This language does not indicate any intent, much less a clear attempt, to bar rescission in recoupment. Like the language at issue in *Western Pacific*, Section 1635(f) simply does not deal with defenses or recoupment. Instead, this provision addresses an extra-judicial, self-effectuating procedure for rescinding a loan. Because it "does not deal with" recoupment, Section 1635(f) does not provide any indication that Congress intended to limit rescission in recoupment. *Cf. Western Pacific*, 352 U.S. at 72.

Section 1640(e) reinforces this conclusion. Section 1640(e) explicitly states that once an action is brought to enforce a debt, unless otherwise provided by State law, claims that were barred by the one-year limitations period may be revived "as a matter of defense by recoupment or set-off in such action." 15 U.S.C. § 1640(e). This language preserves the right of recoupment without qualification; it does not limit consumers to recoupment based on damages. Indeed, nothing in the statute suggests that recoupment based on rescission is excluded from this savings clause, or that Congress intended to impose a special limitation on such claims. The court below, by inferring a three-year bar on rescission by recoupment, violated the admonition of this Court, specifically addressing judicial activism in interpreting the Truth in Lending Act. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 (1980) ("[C]aution must temper judicial creativity in the face of legislative or regulatory silence").

2. **The 1995 Amendments.** The 1995 Amendments to the Truth in Lending Act confirm that the Act is not intended to restrict the availability of rescission in recoupment by explicitly providing that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." *Id.* 1635(i)(3). As discussed above, subsection 1635(i) was added in 1995 to provide that, in foreclosure situations, consumers may exercise rescission rights even where the lender is immune from liability in an affirmative action because of the tolerances and limits on liability in the Act. *See, supra*, at 6. To make clear that the rescission rights set forth in subsection 1635(i) are a floor and not a ceiling, § 1635(i)(3)

explicitly states that this subsection does not affect rescission in recoupment under State law.[7]

Moreover, the 1995 Amendments added limitations on the circumstances in which consumers could affirmatively seek rescission. *See* 15 U.S.C. §§ 1605(b), 1635(h). However, Congress did not add any language suggesting that the

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[7] Contrary to the conclusion of the court below (J.A. 164-165, n. 6), the 1995 Amendments to Subsection 1635(i) do apply to petitioners' mortgage since the statute applies to all consumer transactions "in existence" on September 30, 1995. The litigation in state courts continued through 1997, and the Final Judgment of Foreclosure was not final until then. Thus, the loan was "in existence" during the state court appellate process.

Although the court below recalled the mandate for a 30-day period to permit a petition for writ of certiorari (J.A. 179), the petition was not filed within that period and this Court denied Petitioners' application for a stay pending review. The property was sold through a foreclosure sale prior to the date certiorari was granted, and Petitioners no longer live in the home which is the subject of the mortgage loan in this case.

The foreclosure sale does not deprive this Court of jurisdiction on mootness grounds. *See Gaines v. Continental Mortgage and Investm. Corp.*, 865 F.2d 375, 378 (D.C. Cir. 1989) (where appellants, if successful, could re-open judgment below and obtain "meaningful relief," appeal was not moot). Here, federal and Florida law would provide meaningful relief to Petitioners, if they prevailed. Section 1640(a)(1,2) would provide damages, and Florida law requires that the foreclosure sale be set aside. *See American Bankers Life Assurance Co. v. Williams, Saloman, Kanner & Damian*, 399 So. 2d 365, 367 (Fla. 3d DCA 1981) ("It is no bar to restitution that American Bankers sold the property to another"); *Sundie v. Haren*, 253 So. 2d 857, 858 (Fla. 1971) (even without a supersedeas bond, "[a] party against whom an erroneous [foreclosure] judgment has been made is entitled upon reversal to have his property restored to him by his adversary").

three-year limitation in subsection 1635(f) bars defensive rescission in recoupment brought more than three years after the transaction. Rather, Congress explicitly provided that the special rights to assert rescission in recoupment under the circumstances set forth in Section 1635(i)(1) and (i)(2) are subject to a three-year limitation period, but it did not make rescission in recoupment subject to this three year limitation in circumstances outside of Section (i)(1) and (2), that is, where the violation does not fall within the tolerances or immunity set forth in Sections 1605 and 1649. Instead, subsection 1635(f) was unaffected by the 1995 amendments. Indeed, Congress' decision not to amend Section 1635(f) to extend its three-year limitation to all defensive use of rescission in recoupment is particularly important because by the time of the 1995 Amendments a number of courts, including the Supreme Court of Colorado, had held that subsection 1635(f) did not apply when rescission is raised in recoupment " 'because recoupment is in the nature of a defense.' " *Dawe v. Merchants Mortgage and Trust Corp.*, 683 P.2d 796, 801 (Colo. 1984).[8] The 1995 Amendments do nothing to undermine the prevailing judicial view that the three-year limitation does not apply to defensive use of rescission in recoupment, and reflect a congressional effort to protect the availability of rescission in recoupment – not a clear intent to limit it.

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[8] *See also In Re Botelho*, 195 B.R. 558 (Bankr. D. Mass. 1996); *Federal Deposit Insurance Corp. v. Ablin*, 177 Ill. App.3d 390, 126 Ill. Dec. 694, 532 N.E.2d 379 (1988); *Community National Bank & Trust Co. v. McClammy*, 138 A.D.2d 339, 525 N.Y.S.2d 629 (N.Y. App. Div. 1988).

3. Drafting History. The drafting history of the 1995 Amendments reinforces the conclusion that Congress did not intend to extend the three-year limitation in Section 1635(f) to the defense of rescission in recoupment. Early drafts of the bill that eventually was passed as the 1995 Truth in Lending Act Amendments contained language that would have met the *Western Pacific* and *Reiter* standard by barring rescission in any context after three years.[9] The proposed language explicitly barred

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[9] *See, e.g.*, H.R.1184, § 7, 104th Cong., (1995), which provided:

> SEC. 7. LIMITATION ON RESCISSION PERIOD.
>
> Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentences:
>
> "The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of the 3-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection."

Identical or virtually identical provisions appeared in other bills considered by Congress and congressional committees during this period to limit the availability of rescission in response to the Eleventh Circuit's decision in *Rodash*. *See* H.R. 1858, 104th Cong., 1st Sess., Financial Institutions Regulatory Relief Act of 1995, § 111 (introduced June 15, 1995); H.R. 1362, Financial Institutions Regulatory Relief Act of 1995, 104th Cong., 1st Sess., § 117 (introduced March 30, 1995); S. 650, Economic Growth and

consumers from raising rescission "affirmatively or as a defense" after three years, and preempted state law. However, the proposed language was deleted from the bill before final passage and does not appear in the legislation. *See* 141 Cong. Rec. H9513-14 (daily ed. Sept. 27, 1995). This history buttresses the conclusion that the statute contains no clear statement barring rescission in recoupment after three years because Congress removed language that would have imposed such a bar from the proposed amendments. As this Court has observed, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Arizona v. California*, 373 U.S. 546 (1962). The Court should not imply into the statute the very provision Congress decided not to pass in 1995. *Cf. Heintz v. Jenkins*, 514 U.S. 291, 294-205 (1995) (refusing to imply an exemption for lawyers into the Fair Debt Collection Practices Act).

4. The Decision Below. In the decision below, the Supreme Court of Florida did not apply the teaching of this Court in *Reiter* or *Western Pacific*, nor did it consider the 1995 Amendments. Instead, the court concluded that Congress intended to extinguish the statutory right of rescission because the one-year limitations period for affirmative actions, 15 U.S.C. § 1640(e), includes a savings clause to preserve recoupment, but Congress did not include such a savings clause in the statute's section on rescission, 15 U.S.C. § 1635. J.A. 170-171. This reasoning,

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Regulatory Paperwork Reduction Act of 1995, 104th Cong., 1st Sess., § 117 (introduced March 30, 1995).

in which the court inferred a bar from the *absence* of statutory language, incorrectly applies the applicable principles.

First, rather than look for "the clearest congressional language," the Florida court inferred intent from silence based on the maxim that when Congress puts language in one section of a statute and omits it from another section it is generally " 'presumed' " that the omission was intentional. J.A. 170-171 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). However, both *Reiter* and *Western Pacific* indicate that it is improper to rely on such speculative inferences when deciding whether recoupment is barred by a statute. To the contrary, this Court's cases hold that statutory limitation periods do not apply to defenses, including recoupment, unless the statute explicitly states otherwise. *See Reiter; Western Pacific; Bull.*

Moreover, Sections 1640(e) and 1635(f) are not parallel provisions which warrant the inference that a savings clause in one means that Congress intended to bar claims covered by the other provision. Section 1640(e) imposes a limit on when actions may be brought in court; Section 1635(f) imposes a limit on the extra-judicial procedure for rescinding a transaction. There is nothing irrational in Congress adding a clause on defenses to the section which discusses judicial actions, but not adding parallel language to a section (1635(f)), which does not explicitly address judicial proceedings. The Supreme Court of Florida's conclusion that Congress' failure to enact a savings clause *implies* a bar on rescission in recoupment reads too much into the statute and is not based upon a clear statement of congressional intent.

In addition, implying terms from a comparison of the two provisions is inappropriate because each was adopted at different times to address different issues. The savings clause in Section 1640(e) was adopted in 1980 to resolve a split which had developed among courts concerning whether recoupment defenses for damages were subject to the one-year limitations period in favor of allowing recoupment. *See* Pub. L. 96-221 § 615(a)(4), 94 Stat. 180 (1980). Section 1635(f) did not present any such issue. To the contrary, prior to the Supreme Court of Florida's decision below, courts had uniformly agreed that the three-year period in § 1635(f) does not limit rescission in recoupment. *See supra* p. 14, n. 5. When Congress added § 1635(i) in 1995, the amendment reaffirmed that Congress intended to preserve, not preempt, recoupment under state law.

5. **The Truth in Lending Act's Policy in Favor of Recoupment.** A strained effort to apply the three-year limitation period to cover rescission in recoupment, despite the absence of statutory language imposing such a limit, is inconsistent with the policies underlying the Truth in Lending Act. Truth in Lending violations are often not discovered until the borrower is sued in foreclosure and consults a lawyer. *See Dawe*, 683 P.2d at 801. But, if rescission in recoupment claims were barred by Section 1635(f), lenders which commit violations of the Act could avoid the consequences of rescission and enforce otherwise unenforceable loans by simply delaying the foreclosure proceedings until three years after the transaction. Such a rule would allow creditors to escape the consequences of a Truth in Lending Act violation simply because the three years had passed.

Congress has made clear that it favors the defensive use of the Act in foreclosure proceedings and has protected defensive use of the Act even in situations where affirmative relief is not available. The provisions of the Act which address defenses do not curtail the ability of consumers to raise violations as a defense, but place defensive use, including rescission in recoupment, on a special footing that allows it to be used to rescind loans or seek offset damages in circumstances where the lender would not otherwise be liable. *See* 15 U.S.C. § 1635(i). Construing Section 1635(f) as a limitation on rescission in recoupment is not only unsupported by the statutory language, but is inconsistent with the general Truth in Lending policy of favoring such defenses.

The Supreme Court of Florida suggested that it was inequitable to allow consumers to rescind three years after the transaction. J.A. 169-170. Nothing in the statutory language, however, reflects such a determination. To the contrary, it is equitable to allow consumers to rescind when creditors materially misstate the terms of a loan. In that instance, consumers cannot use the three days to evaluate their decision to enter into the loan, because the lender never provided accurate information about the loan. *In re Porter*, 961 F.2d 1066, 1078 (3d Cir. 1992) ("[B]orrowers who take out consumer loans should have the chance to rethink those transactions if the titles to their homes will be put at risk. *See* for example, S. Rep. No. 96-368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S. Code Cong. & Admin. News 236 264"). When a foreclosure proceeding is brought more than three years after the closing, rescission in recoupment is equitable to both parties, especially when consumers are faced with the

loss of their homes. The creditor is prevented from enforcing a loan that it obtained in violation of federal law; the consumer is not forced to lose a home based on terms that the consumer thought were present, but were not, because of erroneous disclosures; and creditors are entitled to recover the entire principal provided to the consumer, while financing charges collected by the lender are returned to the consumer.

Allowing consumers facing foreclosure to raise rescission in recoupment more than three years after the transaction encourages lenders to comply with the Act. If rescission is absolutely barred after three years, lenders would be encouraged to understate finance charges and annual percentage rates to undercut competitors and close more loans, but they would not be subject to rescission if the errors are not discovered until the three-year period has expired. In addition, a lender that discovers that it has made disclosure errors, particularly systematic errors affecting many loans, will have a strong incentive not to provide corrected disclosures to consumers until the three-year period has expired. Thus, barring rescission as a defense in recoupment would encourage Truth in Lending violations and ultimately would frustrate the Act's purpose. *Cf. Rodash, supra* (Truth in Lending Act should be liberally construed in favor of the consumer); *Clark v. Troy and Nichols, Inc.*, 864 F.2d 1261, 1265 (5th Cir. 1989) (same, noting the "universally applied principle of liberally construing the terms of the Truth in Lending Act to effectuate the underlying purpose of consumer protection").

II. INDEPENDENT OF THE ACT, FLORIDA AND FEDERAL LAW PROVIDE FOR RESCISSION IN RECOUPMENT AS A DEFENSE TO RESPONDENT'S CLAIMS.

A. Florida Law Provides for Rescission in Recoupment; the Decision Below Erroneously Construes Congressional Intent.

In its opposition to certiorari, Respondent argued that the decision was based solely on Florida law and did not present a federal question. This Court's decision to grant certiorari implicitly rejects this claim, and examination of the Florida court's opinion demonstrates that construction of federal law determined the outcome. Florida law recognizes recoupment as a defense and recognizes that rescission may be asserted as a recoupment defense. The Supreme Court of Florida's decision that such recoupment is not permitted was based on its determination that federal law barred the defense of rescission in recoupment three years after the transaction.

It is well established in Florida law that a defense of recoupment may be asserted even though the claim on which it is based is barred by the applicable statute of limitations. *See Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987); *Rybovich Boat Works v. Atkins*, 585 So. 2d 270 (Fla. 1991); *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940). In *Allie*, the court held that a recoupment defense could be used to request rescission of contracts for sale of land and restitution, even though the defendant was time-barred from bringing an independent suit on these claims. *Allie v. Ionata*, 503 So. 2d at 1239-1240. In *Rybovich Boat Works v. Atkins*, the court held that the defense of

recoupment could not be used to revive an action for specific performance that had been barred by the statute of limitations, but specifically reaffirmed that other remedies – including rescission – are available through recoupment. 585 So. 2d at 272.

In concluding that these decisions did not apply, the court below did not rely on any rule of Florida law, but on its conclusion that 15 U.S.C. § 1635(f) extinguishes even defensive rescission three years after the transaction's closing. The District Court of Appeal also based its construction on "the law of Florida and our construction of the TILA." J.A. 143.

Whether Section 1635(f) bars rescission in recoupment turns on construction of a federal statute and congressional intent. In *Western Pacific*, this Court observed that it is "irrelevant" whether a statute of limitations is characterized as jurisdictional or not; "the question would still remain whether Congress intended it to apply to referrals as well as to affirmative suits." 352 U.S. at 73. If, as we argue above, Congress did not intend the statute to preclude defensive use of rescission three years after the transaction, there is no independent basis in Florida law for precluding rescission in recoupment in this case, just as it has been recognized as a defense in other Florida foreclosure actions.

B. Petitioners Have a Claim for Rescission in Recoupment Under Federal Law.

Federal law also recognizes the defense of recoupment for violations of federal rights, even if an affirmative claim is time barred. *Bull v. United States*, 295 U.S. at

262. Federal courts recognize recoupment even where it not specifically provided by statute. Indeed, the recoupment defense plays a significant role in federal tax and bankruptcy litigation. *See, e.g., In re University Medical Center*, 973 F.2d 1065, 1079-80 (3d Cir. 1992); *United States v. Dewey Freight System, Inc.*, 31 F.3d 620, 623 (10th Cir. 1994).

Recoupment is no less necessary for violations of the Truth in Lending Act to protect federal rights protected by the Act. Lenders who initiate foreclosure proceedings should not be permitted to avoid defenses showing that the lender violated federal law in making the loan. To exclude consideration of the lender's wrongdoing in the transaction by disregarding the breach of the federal statute unfairly prejudices consumers' federally protected rights.

Moreover, there is no valid, neutral state ground for not permitting rescission in recoupment based on the violation of federal rights. Local forms of practice are not permitted to frustrate federal rights. *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949). Here, state law explicitly permits rescission in recoupment. And, the state court has never found that a state limitations statute, whether characterized as a statute of limitations or repose, bars a recoupment defense. In the absence of any substantial state rule to the contrary, the recoupment defense is available to Petitioners as a matter of federal law, to protect the federal rights secured by the Truth in Lending Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of Florida, and remand for further proceedings in accordance with federal and Florida law.

Respectfully submitted,

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APPENDIX

Title 15 U.S.C. § 1635 (Right of rescission as to certain transactions) provides:

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and

any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) Rebuttable presumption of delivery of required disclosures

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) Modification and waiver of rights

The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) Exempted transactions; reapplication of provisions

This section does not apply to –

(1) a residential mortgage transaction as defined in section 1602(w) of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required

under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

(g) Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

(h) Limitation on rescission

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

(i) Rescission rights in foreclosure

(1) In general

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if –

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Tolerance for disclosures

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if

the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

(3) Right of recoupment under State law

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

Title 15 U.S.C. § 1640 (Civil liability) provides:

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than

$100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this

title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635, section 1637(a), or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

(b) Correction of errors

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) Unintentional violations; bona fide errors

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(d) Liability in transaction or lease involving multiple obligors

When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639 of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may –

(1) intervene in the action;

(2) upon intervening –

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

No provision of this section, section 1607(b), section 1607(c), section 1607(e), or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) Recovery for multiple failures to disclose

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer

lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) Offset from amount owed to creditor or assignee; rights of defaulting consumer

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter.

(i) Class action moratorium

(1) In general

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter –

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a

refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor –

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635(a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Board or from among forms based on such model forms.

(2) Exceptions for certain alleged violations

Paragraph (1) shall not apply with respect to any action –

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606(c) of this title; or

(B) described in paragraph (1)(B)(iii), if –

(i) no notice relating to rescission rights under section 1635(a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

Title 12 C.F.R. § 226.23 (Right of rescission), provides:

(a) Consumer's right to rescind.

(1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section. [FN47]

[FN47] For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or

delivery of all material disclosures, [FN48] whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the act.

[FN48] The term "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and the disclosures and limitations referred to in § 226.32(c) and (d).

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

* * *

(f) Exempt transactions. The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation.

(3) A transaction in which a state agency is a creditor.

(4) An advance, other than an initial advance, in a series of advances or in a series of single-payment obligations that is treated as a single transaction under § 226.17(c)(6), if the notice required by paragraph (b) of this section and all material disclosures have been given to the consumer.

(5) A renewal of optional insurance premiums that is not considered a refinancing under § 226.20(a)(5).

(g) Tolerances for accuracy. –

(1) One-half of 1 percent tolerance. Except as provided in paragraphs (g)(2) and (h)(2) of this section, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(2) One percent tolerance. In a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by § 226.32), if there is no new advance and no consolidation of existing loans, the finance charge and other disclosures affected by the finance charge (such as the amount financed

and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(h) Special rules for foreclosures. –

(1) Right to rescind. After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the consumer shall have the right to rescind the transaction if:

(i) A mortgage broker fee that should have been included in the finance charge was not included; or

(ii) The creditor did not provide the properly completed appropriate model form in Appendix H of this part, or a substantially similar notice of rescission.

(2) Tolerance for disclosures. After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than $35; or

(ii) is greater than the amount required to be disclosed.